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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

James R. King,

Appellant,

vs.

State Board of Elections, *et al.*

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Did the District Court Correctly Hold that Illinois' Congressional District 4 is a Narrowly-Tailored Remedy to Further a Compelling Governmental Interest?

2. Can this Bizarre, Uncouth District, Which Resembles a Rorschach Blot and Was Drawn on the City Block Level, Be a Narrowly-Tailored Judicial Remedy for a Violation of Section 2?

3. Did the District Court Err When It Applied the Standard of "Clear Error" to the Evidence in the Case under a Modified Rule 60(b)?

LIST OF PARTIES

Plaintiff

James R. King

Defendants

State Board of Elections
David E. Murray
Lawrence E. Johnson
Hannelore Huisman
Judith Jones
Langdon D. Neal
Theresa M. Petrone
Wanda Rednour

Defendant Intervenors

Bobby Rush
Timuel Black
Al Johnson
Elvira Carrizales
Neomi Hernandez
The Chicago Urban League

United States

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BASIS OF JURISDICTION

The District Court for the Northern District of Illinois entered the Order in this cause on August 1, 1997, denying the Plaintiffs request for temporary and permanent injunctive relief. The Plaintiff files this appeal pursuant to 28 U.S.C. Sec. 1253, Direct Appeals from Decisions of Three-Judge Courts. Plaintiff's Notice of Appeal was filed on August 29, 1997. Notice of Appeal, Appendix, 1.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The United States Constitution provides at Article III, Section 2 that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, ...; [and] to Controversies . . . ."

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.". The relevant statutory provision is section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Sec. 1973, the pertinent parts of which are reproduced at App. 75.

Illinois State Statutory law on Precincts, Illinois Compiled Statutes, 735 ILCS Ch. 5/11-2, et seq., is reproduced at App. 76.

STATEMENT OF THE CASE

On November 12, 1996 this Court vacated and remanded this case "for further consideration in light of *Shaw v. Hunt*, 517 U.S. ___ (1996) and *Bush v. Vera*, 517 U.S. ___ (1996). *King v. State Board of Elections, et al.*, ___ U.S.___, 117 S.Ct. 429 (1996)." On August 1, 1997, the lower court, upon reconsideration of this matter, "affirm[ed] its earlier ruling that the Fourth District passes constitutional muster. . . ." *King v. State Board of Elections, et al.*, ___ F.Supp.___ (1997) (*King II*), Opinion 2, App. 73. The case thus returns for a second appeal to this Court. The lower court issued its original opinion upholding District 4 on March 13, 1996. *King v. State Board of Elections, et al.*, ___ F.Supp.___ (1996) (*King I*), Opinion 1, App. 4 et seq.

A. *Hastert et al. v. State Board of Elections*

The congressional districting map challenged in this case was court-ordered. *Hastert et al. v. State Board of Elections*, 777 F.Supp. 634 (N.D.Ill. 1991). Prior to the initiation of *Hastert*, the 1990 census data indicated that the State of Illinois was to lose two congressional seats, due to a comparative decline in population growth. *Id.* at 638. The Illinois legislature failed to enact a plan and various Democratic and Republican party members initiated the *Hastert* action to ensure congressional redistricting. Shortly thereafter, a group of Hispanic and African-American voters filed a similar action which also sought the creation of an Hispanic majority congressional district under §2 of the Voting Rights Act. *Id.* These cases and others were consolidated. *Id.*

All the parties to the *Hastert* litigation agreed that the "population and demographic changes within the City of Chicago from 1980 to 1990 mandated the creation of an Hispanic majority district." *Id.* at 640. The *Hastert* court also said that "[i]ndeed, an agreement on this issue [the creation of an Hispanic majority district] may be the crucial factor in facilitating the creation of an Hispanic district." *Id.* Consequently, the district court in *Hastert* approved District 4, relying upon the requirements for a §2 violation under the Voting Rights Act pursuant to *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986). The *Hastert* court found that the three threshold conditions of *Gingles* were met, and that under the totality of the circumstances, District 4 was required under §2 of the Voting Rights Act. The specific findings of fact will be discussed in detail as they relate to the instant case in the course of the Argument.

B. Lower Court's First Decision.

The Plaintiff, James R. King, a resident of the Fourth Congressional District ("District 4"), brought an equal protection challenge in February, 1995. The lower court, two of whose judges presided over the *Hastert* trial, found that District 4 was predominantly drawn on the basis of race and indicated that it would apply strict scrutiny. The evidence which the lower court cited supporting its finding that District 4 was predominantly drawn on the basis of race was the *Hastert* court's perception that it had to create four super-majority minority districts, one of which would be Hispanic, Opinion 1, App. 39-40, and that the boundaries of District 4 were "drawn to maximize the percentage of Hispanics located within the District.". Opinion

1, App. 42-43.

The lower court proceeded through the required analysis of a §2 district subject to an Equal Protection challenge and adopted a majority of its findings of fact from the evidence admitted in the *Hastert* court. Even though the lower court gave the Plaintiff the opportunity to cross-examine persons who submitted affidavits and other evidence in *Hastert*, this did not compensate for the undue weight the court below assigned to that evidence. The lower court found that the *Hastert* court had a "strong basis in evidence" for finding that the threshold conditions of *Gingles* were met and, further, that a violation was established under the "totality of the circumstances."

The lower court upheld District 4 saying that it was "narrowly-tailored". Although the *Hastert* court never applied strict scrutiny to District 4 and, therefore, never determined that it was "narrowly-tailored" in that case, the lower court held that the Plaintiff failed to establish a violation of the Equal Protection clause because he did not show that the *Hastert* court "abused its discretion" when it adopted the "narrowly tailored" District 4. The lower court's deference was ostensibly justified on the basis of a "modified" application of Rule 60(b). King objected to this standard of review of the evidence. Plaintiff's Additional Trial Brief, App. 102. The details of the lower court's findings will be addressed in the course of the argument.

C. Appeal to United States Supreme Court, Order Remanding for Reconsideration and Lower Court's Second Decision.

The Plaintiff filed his first appeal to this court on March 22, 1996, contesting the lower court's decision to uphold District 4 as narrowly-tailored. On November 12, 1996, this Court ordered the lower court to reconsider its decision in light of *Bush v. Vera,* 517 U.S. ___, 116 S.Ct. 1941 (1996) and *Shaw v. Hunt,* 517 U.S. ___, 116 S.Ct. 1894 (1996). That order followed upon the Motion to Vacate and Remand filed by the Department of Justice. In that Motion the Department of Justice stated that

> it would be appropriate to remand this case to the district court so that that court, in the first instance, may apply the teachings of *Bush* and *Shaw II* to the facts of this case. On remand, the district court could, if it deemed it necessary

or desirable, take additional evidence regarding the application of the *Bush* and *Shaw II* narrow-tailoring standards to this case.

Motion, October 1996.

Upon remand, on January 31, 1997, the Plaintiff filed a Motion to Set for Hearing. The Motion alternatively sought relief based upon the evidence already in the record in light of the decisions of *Bush v. Vera* and *Shaw v. Hunt* if the lower court were to decline to have an additional hearing. The lower court denied Plaintiff's request for an additional hearing, and denied it again upon his Motion for Reconsideration saying "[n]either *Shaw II* nor *Bush* introduces legal guidelines that require additional findings of fact by this court" and that "the pertinent factual data needed to determine the constitutionality of the Fourth District was before this court upon its initial adjudication of this matter." Opinion 2, App. 73. All briefs were submitted to the court by April 18, 1997, and on August 1, 1997 the lower court issued a short opinion affirming its earlier ruling.

SUMMARY OF ARGUMENT

Even though the Plaintiff was not a party to the *Hastert* proceeding in November 1991, the lower court "modified" Rule 60(b) in order to apply a "clear error" standard to the evidence presented at the trial of this case in December 1995. This standard in effect displaced the presumption which should have been made in favor of the Plaintiff that the racially drawn District 4 was unconstitutional and, consequently, displaced the burden of the Defendants and Defendant-Intervenors, (hereinafter "Defendants")[1] to produce evidence to justify District 4. By giving the *Hastert* decision this binding effect, the lower court failed to make the independent examination of District 4 required by the decisions of this Court.

In light of the obviously bizarre shape of District 4, the lower court on remand had the obligation to independently and strictly scrutinize whether District 4 "subordinated traditional districting principles to race more than was reasonably necessary", *Bush* at ___, 116 S.Ct., at 1961. Review of the lower court's reconsidered opinion, and the original opinion, indicates that the lower court erred when in both opinions it strictly deferred to the *Hastert* court's

[1] "Defendants" refers primarily to Defendant-Intervenors MALDEF and the Department of Justice, who most actively defended this case.

decision to create District 4, and upheld in both instances a bizarrely-shaped and patently offensive racial classification which so clearly subordinated traditional districting principles.

The subordination of compactness is obvious from the narrow "western connector" which winds outside the City of Chicago, only to wind back again to tie together the two dispersed Hispanic populations within Chicago. The "connector" does not merely indicate racial intent when it segregated Hispanics from white and African-American populations, but indicates the limitless application of computer technology to advance the interest of race-based politics in Chicago. The subordination of respect for political subdivisions is evident in District 4's "western connector" which split two precincts thereby reducing them to a level of merely 1 and 2 voters such that District 4 likely deprived those voters of ballot secrecy. The use of block-by-block racial data to separate most of the highest percentages of Hispanic census blocks from white and black populations not only resulted in a fifty-two percent (52%) split of voting precincts in 1991, but also created a continuous "ragged" border for District 4, that like the "western connector", indicates that even if a reasonably compact district could have been created for Hispanics, District 4 was not narrowly-tailored because "nothing in §2 requires the race-based creation of a district that is far from compact." *See, Bush*, at ___, 116 S.Ct., at 1961. Section 2, however, does not authorize a federal court to uphold a district which was far from being narrowly-tailored. Clearly District 4's lack of narrow-tailoring resulted, and continues to result, in the patently offensive effect of "perpetuating such notions" that persons of the same race "think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw v. Reno*, 509 U.S. 630. 113 S.Ct. 2816 (1993).

This strict scrutiny analysis, however, presumes that the lower court had a "strong basis" to find that some sort of remedy was appropriate, even if it were not a minority-majority district in the form of District 4. But the evidence in the case indicates, and is supported by the findings of the lower court, that both a "connector" and block-by-block drawing were required to draw any type of remedial §2 district for Hispanics, irrespective of the configuration of any of the three African-American §2 congressional districts. Therefore, this is a case where "because of the dispersion of the

minority population, a reasonably compact majority-minority district cannot be created, [and] §2 [did] not require a majority-minority district." *See, Bush* at ___, 116 S.Ct., at 1961.

Thus, prior to evaluating whether District 4 could be narrowly-tailored, the lower court was in error to find Hispanics "sufficiently compact" under *Gingles* where the evidence shows extensive dispersion of the Hispanic population in Chicago. Additionally, the citizenship data casts doubt that Hispanics were "sufficiently numerous" under *Gingles*. And, under the third prong of *Gingles*, the lower court relied upon an analysis of electoral races by the Defendants which showed, among other things, that a candidate of choice of Hispanics won in 27 of 41 elections, and revealed only three elections which, as a matter of law, assertedly constituted legally sufficient white racial bloc voting. On these bases alone District 4 did not meet the threshold factors of *Gingles* and the lower court did not properly apply strict scrutiny. Lastly, the lower court found a sufficient presence of the *Zimmer* factors, relying upon the *Hastert* court's findings gleaned from two dated cases to support its finding of a "strong basis in evidence". These cases, *Rybicki v. State Board of Elections*, decided in 1982, and *Ketchum v. Byrne*, decided in 1984, both decided more than thirteen (13) and eleven (11) years from the trial in the instant case, each discussed evidence which was stale and, therefore, insufficient to show the presence of the *Zimmer* factors such that under the "totality of the circumstances" Hispanics were entitled to a finding of a violation of §2 in December 1995. For these reasons, the lower court did not properly apply strict scrutiny to the racially gerrymandered District 4, and the lower court's decision should be overturned.

ARGUMENT

I. District 4 Was Not Narrowly-Tailored Because The Excessive Splitting of Precincts and Neglect of Any Compactness Standard Resulted in Significant Deviations from Traditional Districting Principles.

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[2] Townships: District 4 splits eight (8) townships, other districts split a greater or equal number, District 3 (9), District 6 (8). Cities: District 4 splits eighteen (18) cities, where other districts split a greater or equal number of cities, District 6 (27), District 11 (26), District 13, (23), Districts 3 and 8 (22). Cleveland Report, App. 86.

When the lower court applied strict scrutiny, it was required to determine whether District 4 was "narrowly-tailored" to the compelling state interest of avoiding liability under §2. *Shaw II* at ___, 116 S.Ct., at 1905-1906. District 4, however, went clearly beyond the goal of avoiding liability under §2, *see, id.*, when it "subordinate[d] traditional districting principles to race, substantially more than [was] 'reasonably necessary' . . . ." *Bush*, at ___, 116 S.Ct., at 1961.

A. Excessive Splitting of Voting Precincts.

The lower court found that the 4th Congressional District split a number of political subdivisions: eight (8) townships, eighteen (18) municipalities, including the City of Chicago, twenty (20) aldermanic wards and 218 voting precincts. Opinion 1, App. 45. Throughout the State of Illinois, there are several other congressional districts which split a greater or equal number of counties, townships, and cities than did District 4, but no congressional district split the number of voting precincts to the degree in District 4.[2]

On the basis of the evidence of split political subdivisions, other than voting precincts, the lower court in its reconsidered opinion did not think that District 4 excessively split local political subdivisions, saying:

> [in its earlier opinion this court] held that the data permit "the uncertain conclusion that compared to other Illinois congressional districts, the map of the Fourth Congressional District did not excessively split political subdivisions" *Id.* While uncertain, this conclusion offers support that the Fourth District is "reasonably compact" when viewed in comparison to other Illinois congressional districts and therefore should not be disregarded.

Opinion 2, App. 72, n.5. The congressional districts which split a greater number of these types of political subdivisions, however, Districts 3, 6, 8, 11, and 13, are larger districts with dispersed population, unlike District 4 which is urban. A district's failure to split county and municipal lines is "unremarkable in the context of large, densely populated urban counties." *Bush*, at ___, 116 S.Ct., at 1954.

District 4 split precincts, however, to a degree far greater than other congressional districts. District 4 split 218 precincts at the time of its creation, more than double the 111 split precincts in the

next closest congressional district, District 5, which shares a border with District 4. The excessive splitting of precincts is particularly telling of the disrespect for local political subdivisions in the City of Chicago, and where the boundaries of District 4 go outside of Chicago, in Cook County. Illinois law provides that in Chicago, the election precincts are to "contain nearly as practicable 600 voters". Illinois Compiled Statutes Ch. 10, Sec. 5/11-3 (West 1994), App. 76. In Cook County, the area surrounding Chicago, the county board is to "divide its election precincts into "election districts so that each shall contain, as near as may be practicable, 500 voters." *Id.* at 5/11-2. District 4 did not respect this traditional districting policy embedded in state law.

It is not insignificant that District 4 split a substantial number of precincts which is an indication of the split of neighborhoods, community areas, school zones, parishes, and other "non-racial bases of political identity." *See, Bush* at ___, 116 S.Ct., at 1962. The lower court, however, did not adequately weigh this significant deviation from traditional districting criteria in asking whether it was compelled to uphold District 4. The excessive splitting of precincts caused administrative difficulties, including probable loss of ballot secrecy in several precincts that were split to small population levels, in addition to inconvenience to a substantial percentage of voters, each of which shows the pervasive effects of subordinating the principle of maintaining the integrity of voting precincts to race.

Precincts within the "western connector" were split to such low population levels, that the ballot secrecy of at least three Cook County voters was likely compromised in the 1994 general election for U.S. Representative for the 4th Congressional District. These voters, only two (2) of whom were in Stickney precinct 40, and only one (1) in Proviso precinct 132, can be identified by matching the poll books to the canvass of election results. Lewis Test. App. 89, Selected Precinct Election Results, App. 90. *See, Bush*, at ___, 116 S.Ct., at 1959 (similar concern). *Cf.* Illinois Compiled Statutes, Ch. 735, Sec. 5/8-910 (West 1994) App. 81 (traditional districting principle of ballot secrecy).

The evidence submitted by the Defendants in the form of an Affidavit of Robert Sawicki, App. 110, reveals how the split of so many precincts by District 4 was not consistent with the policy of the Chicago Board of Election Commissioners (hereinafter "CBEC")

to avoid multi-district precincts, App. 110 (¶6), and that administrative irregularities resulted: 1) since 1992 (at the creation of the Fourth Congressional District) the CBEC assigned two additional poll judges in multi-district precincts, App. 110 (¶6); and 2) at the time of the '92 primary elections there were 400-450 multi-district precincts. Sawicki Affidavit, App. 111 (¶10). These administrative headaches can be considered further evidence of subordination of the principle of maintaining the integrity of political subdivisions. *See, Bush* at ___, 116 S.Ct., at 1959 (an increase in the number of precincts from 672 to 1,225 to accommodate new congressional boundaries, resulting in administrative headaches, was relevant to violation of traditional districting principles). The excessive number of split precincts in District 4 caused inconvenience to voters, where 52% of the precincts which District 4 touched were split. Percentage of Population in Split Precincts, App. 87. The next highest, the Fifth Congressional District, split 19% and shares a significant border with the District 4. *Id.* The Plaintiff's evidence also showed that approximately 21% of the population of the District 4 lived in a split precincts after the creation of District 4 with the next highest being the Fifth Congressional District again, at 11%. *Id., Cf. Bush*, at ___, 116 S.Ct., at 1959 (where 60% of a districts residents live in split precincts this "exhibit[s] utter disregard of city limits, local election precincts, and voter tabulation district lines.") Therefore, the lower court erred in finding that District 4 did not excessively split political subdivisions.

B. The Lower Court Ignored the Traditional Districting Principle of Compactness.

Upon reconsideration the lower court found that District 4 is compact saying that "this court [in its earlier opinion] also rejected the argument that its bizarre shape belies compactness" and, in support of this argument, cites to various evidence. *See*, Opinion 2, App. 70. This evidence, however, points to the opposite conclusion. It goes beyond reason, for example, and contradicts this Court's precedents, to find that "block-by-block" drawing indicates compactness, as is asserted by the lower court. Opinion 2, App. 70.

The lower court's finding of compactness in its reconsidered opinion, moreover, contradicts the lower court's original finding that District 4 was not compact:

this court must conclude that compactness was not

> considered [by the Hastert court] in the configuration of the Fourth Congressional District. In any event, this court finds that the Fourth Congressional District is not visually compact. In addition, unless the court completely discounts the 4.7% of the district's population dispersed throughout the western connector, the district is not functionally compact either.

Opinion 1, 43, n.48 (citations omitted). *See, also, Hastert* at 648, n.24. The evidence supports the lower court's original finding that District 4 was not compact. Under Illinois state law District 4 would not be considered compact. *See, Schrage v. State Bd. of Elections*, 88 Ill.2d 87, 98, 430 N.E.2d 483, 487 (1981).

The "Western Connector". The most visible aspect of District 4 which contributes to its non-compactness is the what the court has termed the "western connector". It winds a narrow path out of the City of Chicago to the border of DuPage County only to wind back again into the City of Chicago to tie together the northern and southern Hispanic populations. Where the "connector" went through populated areas, the mapmakers consistently sought out the highest percentages of Hispanic population. Cleveland Test., App. 82, *see, also*, Hispanic population in the Townships of the "Western Connector", App. 83, *and* Opinion 1, 44 ("Portions of the western connector are also explainable only on racial grounds"). The non-populated portions of the "western connector" contain a "significant amount of vacant land, park land, cemeteries and industrial areas . . . to ensure the district's contiguity." Opinion 1, App. 44 n.49.

The lower court attempts to sever consideration of the "western connector" from consideration of District 4 as a whole, arguing that it can look at the configuration of the northern and southern populations of District 4 without considering the legal significance of the "western connector"; and, indeed, the lower court's opinions do not consider it legally significant in its analysis. Without the "western connector", however, District 4 would not be contiguous[3] and, therefore, District 4's contiguity depends upon the "western

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[3] Even the lower court acknowledged that "[t]his contiguity, however, is 'hypertechnical[] and . . . cynical[]" *see Hays v. State of LA*, 839 F.Supp. 1188, 1200 (W.D. La 1993), since it is preserved through the use of non-populated parks and barren industrial areas." Opinion 1, App. 44 n.49.

connector" for its legal existence. Indeed, the northern and southern parts of District 4, which make up 95.30% of its population, are not contiguous, and this makes the "western connector" a necessary part of District 4's configuration. And as stated above, it is also indicative of the dispersion of the Hispanic population such that Hispanics could not have been found to meet the first threshold condition of geographic compactness under *Gingles* in the first place. *See*, discussion, *supra* at __.

Further, the drawing of a "connector" around the African-American population was itself a "predominant[] racial reason[]". *See, Bush* at ___, 116 S.Ct., at 1970. *See, also*, Population Between the "Islands" of Hispanic Population, App. 100. Therefore, whether its called a "connector" or "land bridge", *see, Miller v. Johnson*, 515 U.S.___, ___, 115 S.Ct. 2475, 2488-89, it dramatizes the "subordinat[ion of] traditional districting principles to race substantially more than is 'reasonably necessary'. . . ," *see, Bush*, at ___, S.Ct. at 1961, and "cause[s] constitutional harm insofar as [it] convey[s] the message that political identity is, or should be, predominantly racial." *Id.*, at ___, S.Ct. at 1962. The use of such a lengthy, narrow, winding, and multidirectional "connector" so excessively violates the traditional districting principle of compactness so that District 4 was not "narrowly-tailored".

"Block-by-Block" Drawing of the Boundaries of District 4. Review of the map indicates that the Hispanic populations were carefully segregated from adjacent white and African-American populations and that the lines "were drawn to maximize the percentage of Hispanics located within the district. . . . " and with "exquisite detail". Opinion 1, App. 43. The lower court said census block data,

> permitted the map makers to draw the district's boundaries on a block-by-block basis in order to maximize the concentration of Hispanics in the district. As a result, when a map of the Fourth Congressional District is superimposed over a map showing the concentration of the Hispanic population drawn at the census tract level, the district map "includes virtually all areas of high percent Hispanic concentration on the northern . . .part of the City of Chicago as well as virtually all of the areas of high Hispanic concentration on the southern part of the City of Chicago.

Opinion 1, App. 43. The use of "block-by-block" racial data, in conjunction with "direct evidence of racial considerations" is

"substantial evidence that it [is] race that [leads] to the neglect of traditional districting criteria . . . ." *Bush* at ___, 116 S.Ct., at 1953. In contrast to *Bush*, the lower court, however, considers this evidence to support the opposite legal conclusion. *See,* Opinion 2, App. 70-72.

The Northern & Southern "Appendages". This block-by-block segregation of Hispanic populations from white and African-American populations continues throughout what the lower court calls the "appendages" or "promontory" points of District 4. The lower court found that these portions were also drawn on the basis of race, relying upon the *Hastert* court's statement that

> [t]o ensure a sufficient Hispanic concentration within the proposed district, both maps shoot rays out from the northwest and southwest enclaves *to capture additional Hispanic population.*

Opinion 1, App. 44. (emphasis in original), *see, also,* Hispanic VAP Census Map w/District 4 Overlay, App. Attachment. The "appendages" are further evidence of the unreasonable subordination of traditional districting principles to the consideration of race. And, like the "western connector" the "appendages" also indicate the dispersion of the Hispanic populations.

Even if the Plaintiff were to concede that lower court had a "strong basis in evidence" to find a violation of §2, the lower court failed to properly apply strict scrutiny because it was unreasonable to uphold a district which was not "reasonably compact" nor "maintain[ed] . . . traditional boundaries", *Bush* at ___, S.Ct. at 1960. The lower court was obligated to determine whether District 4 was narrowly-tailored to the meet the state's compelling interest in complying not only with §2, but also with the equal protection concerns that this Court has raised in the cases of *Shaw I, Miller, Bush,* and *Shaw II.* In other words, whether a districting plan is judicially or legislatively enacted, it must be narrowly-tailored to meet a compelling state interest to comply with the Equal Protection Clause, not merely an expansive view of §2 of the Voting Rights Act.

II. THE LOWER COURT LACKED A "STRONG BASIS IN EVIDENCE" TO FIND THAT THERE WAS A VIOLATION OF §2.

When applying strict scrutiny to a majority-minority district created under §2 of the Voting Rights Act a court must first ask if there was a "strong basis in evidence" for finding a violation of §2; and in particular whether a defendant has shown the presence of the three threshold conditions of *Gingles*. *Bush v. Vera*, 517 U.S. ___, ___, 116 S.Ct. 1941, 1961 (1996). The lower court adopted the evidence in the *Hastert* case to support its finding that the three threshold conditions of *Gingles* were met. Opinion 2, App. 67-68 (adopting findings by *Hastert* court set forth at Opinion 1, App. 23-24), *see, also*, Opinion 1, App. 47-53. It consequently found that there was a "strong basis in evidence" to find a violation of §2. Opinion 1, App. 54.

A. Geographical Compactness and Numerousness of Hispanics

1. Geographical Compactness

The lower court found, first, that the Hispanic population in Chicago and Cook County was "sufficiently numerous and geographically compact." The lower court based its findings almost exclusively upon the following evidence from *Hastert*.

> (1) "the Hispanic population of Chicago now totals 545,852, and increase of 29.33% over the 1980 count of 422,052."
>
> (2) "Most of the Chicago/Cook County Hispanic population is clustered into two dense enclaves, one on Chicago's near northwest side and another on the near southwest side."
>
> (3) "The two separate Hispanic population clusters are less than a mile from each other at their closest points."
>
> (4) "The separation of the clusters is not indicative of the existence of two distinct communities, but appears to have occurred as a result of exogenous physical and institutional barriers."

Opinion 1, App., 23, *Hastert* at 649. As an additional basis to support the finding of compactness of the Hispanic population, apart from the evidence in *Hastert*, the lower court said in its original opinion that

> a fairly small rectangle can be drawn around the two enclaves on the near northwest and near southwest sides of the city that would include a substantial majority of the Hispanic population within the City of Chicago. This rectangle serves as evidence of the Hispanic community's geographic compactness.

Opinion 1, App. 43, n.48. Based upon this evidence the lower court "accordingly conclude[d] that the *Hastert* court's finding of geographic compactness was appropriate." Opinion 1, App. 53.

First and foremost, the lower court's "hypothetical rectangle" cannot possibly show that the Hispanic population was compact, but actually serves to show their non-compactness since such a rectangular district would be twice as populous and half the percentage of Hispanics as are currently in District 4. And, further, a rectangle could as easily be drawn around any non-compact area, such as North Carolina's District 12.

Second, simple review of the residential patterns of the Hispanic population indicate that the Hispanic population is not sufficiently compact, but dispersed. *See,* Hispanic VAP Map, App. Attachment. The non-compactness of the Hispanic populations is evident from the statement of the Defendant's own witness that "[j]oining Cook County's north/south Hispanic populations by the use of a connector is necessary in order to create a majority Hispanic congressional district." Affidavit Testimony of Aguillon, App. 84. Besides the "connector" actually used, all of the alternative plans in the record indicate the use of a "connector" or "land bridge" of some sort was necessary to maintain contiguity between the northern and southern Hispanic populations. *See,* Illinois Latino Committee for Fair Redistricting Maps from Aguillon Affidavit ("Middle Connectors"), App. 111, 112. *Compare,* Taylor Report, Map 2: Latino Plurality Block Groups, App. 99, *with* Hispanic VAP Map, App. Attachment. This is evidence of the dispersion of the Hispanic population.

In *Shaw v. Hunt* this Court held that North Carolina's District 12 did not "remedy the anticipated violation" when it stated that

> [n]o one looking at District 12 could reasonably suggest that the district contains a "geographically compact" population of any race. . . . Therefore, where that district sits, "there neither has been a wrong nor can there be a remedy" *Growe, supra* at 41, 113 S.Ct., 1t 1084.

Shaw, at ___, 116 S.Ct., at 1906, *see, also, Bush* at ___, 116 S.Ct., at

1961 ("District 30 . . . reaches out to grab small and apparently isolated communities which . . . could not possibly form part of a compact majority-minority district. . . .") Likewise, in this case, the residential patterns show that Hispanics were dispersed to such a degree within the dense urban setting of Chicago such that it was error for the lower court to find the Hispanic population was "sufficiently" compact.

*2. **Numerousness.***

At trial the Plaintiff asserted that Hispanics were not numerous enough because those of non-Puerto Rican ancestry have very low citizenship rates. After citing *Johnson v. DeGrandy*, and *Growe v. Emison*, in which this Court declined to rule on the issue, the lower court said

> [t]his court too declines to resolve this question since King has not established via competent evidence that the Hispanic citizen voting age population falls below fifty percent. Hence, . . . the *Hastert* court properly found that the City of Chicago/Cook County community was sufficiently numerous to constitute a majority in a properly drawn district. The congressional election results of 1992 and 1994 serve to confirm this conclusion.

Opinion 1, App. 50, Opinion 2, App. 69. As a matter of law, however, it is entirely inconsistent for the Voting Rights Act to protect persons who, because of lack of citizenship, cannot vote to "elect representatives of choice", particularly when "elect[ing] candidates of choice" is a legally significant element in a §2 claim. *Voting Rights Act*, §2, *Gingles*. Further, the Voting Rights Act expressly says "citizens" in both sections 2(a) and 2(b). *See, Voting Rights Act*, 42 U.S.C. 1973, Appendix, 75. Therefore, when there are not enough potential citizen voters in order to obtain a citizen voting age population in excess of 50%, the first *Gingles* threshold cannot be met and "there neither has been a wrong nor can there be a remedy." *See, Shaw II*, at ___, 116 S.Ct. at 1906.

In the instant case, the lower court clearly confused the testimony regarding the percentage of **district citizens who are Hispanic** with census data regarding the percentage of **Hispanics who are citizens**, which constitutes clear error. Opinion 1, App. 50. The Plaintiff's expert, Mr. Cleveland, testified from census data that no more than 45% of the citizens in the district were of Hispanic heritage and that

the percentage "is actually considerably lower than that" because there is a "problem [of] overreporting of citizenship among Hispanics". Cleveland Test., App. 93, *see. also,* Cleveland Report, App. 91. The lower court mistakenly suggests in footnote 58 that Cleveland's testimony is inconsistent with census data showing 56.3% of all Hispanics in Chicago are citizens. In fact, Mr. Cleveland's testimony was consistent with the census data: 56% of all Chicago Hispanics are citizens. Cleveland Test., App. 93.[4]

The lower court also suggests that Cleveland's calculations "did not compensate for amnesty programs." The record clearly indicates that the amnesty programs did not result in more than 14,033 persons of Latino background being granted citizenship in Chicago between the years 1991 through 1994, which constitutes only a 2% increase when compared to the population of District 4 (571,530). Moreover, these data cover the City of Chicago, not just District 4. *See,* Taylor Declaration, App. 98. Therefore, an increase of 2% over 45% still does not amount to greater than the 50% needed to be sufficiently numerous under *Gingles*. Therefore, the lower court did not have a "strong basis in evidence", either by way of the *Hastert* court or other evidence, to uphold District 4 since Hispanics were not shown to be sufficiently numerous.

B. The Lower Court's Findings of Racial Bloc Voting do not support the finding of a Strong Basis in Evidence.

In this particular instance, the lower court found, apart from the findings of the *Hastert* court, that white racial bloc voting exists. The lower court found "a definite and continuing pattern of white racial-bloc voting against Hispanic candidates." Opinion 1, App. 51-52. The court relied upon the evidence presented by Dr. Lichtman, the expert for the Defendants, and in particular his statement that "'since 1987, Hispanics have been elected in every election district for every type of office with a voting age majority of Hispanics, but not in any district lacking such a majority.'". Opinion 1, App. 52.[5]

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[4]Other evidence at trial confirmed this view, including evidence of the Defendant-Intervenors. See, Al Filo App. 96 (in 1986, 44% of all Chicago Hispanics were ineligible to vote); Latino Institute, App. 97 (59.4% all Illinois Hispanics are citizens); MCIC Table, App. 98 (61% of all Metro Chicago Hispanics are citizens).

[5] This quote of Dr. Lichtman's is taken out of context by the lower court because Dr. Lichtman's testimony was that, indeed, Hispanics could not be elected in any district lacking an Hispanic majority, but indicated that he did not include the city-

Put very simply, this is not the test. Under *Gingles*, the definition of legally significant white racial bloc voting is whether "the white majority votes sufficiently as a bloc to enable it . . . *usually to defeat* the minority's preferred candidate." *Gingles*, at 51, 106 S.Ct., at 2766-67 (emphasis added). This Court has not in any way detracted from or amended that standard and, in fact, requires it for establishing a "strong basis in evidence" under strict scrutiny. *See, E[illegible]h*, at ___, 116 S.Ct., at 1961.

White racial bloc voting entails three operative considerations in determining whether an electoral race is proof of racially polarized voting: first, *a priori*, a minority group, by a majority of the minority group's votes, selects a "candidate of choice"; second, the minority's candidate of choice must be defeated; and third, the white vote is sufficient to cause the minority's candidate of choice to lose. Under this standard, only three (3) of the elections analyzed by Dr. Lichtman may be reasonably construed as white racial bloc voting.

Dr. Lichtman analyzed a total of 41 elections. Of that number there were a total of 27 elections in which the Hispanic candidate of choice won an election. In twenty-two (22) of races the Hispanic candidate of choice was Hispanic. In another five (5) of the elections, the Hispanic candidate of choice was white.

Of the remaining fourteen (14) elections analyzed, the Hispanic candidate of choice lost. With the exception of the three (3) legally sufficient races,[6] there are various reasons other than white racial bloc voting which explain the losses. There are four (4) races in which the Hispanics constituted a majority percentage in the relevant district, but were unable, likely due to low turnout, to elect their candidate of choice.[7] In another two (2) elections there was substantial white support, and the voting behavior of the black voters

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wide elections of Santos as City Treasurer, and of two judges elected city-wide in 1988 and 1990. The City of Chicago is not majority Hispanic.

[6] 1987 Primary City Clerk Election, with 93 percent of whites voting against the Hispanic candidate of choice; 1992 Primary Ward Committee District 12 Election, with 88 percent of whites voting against Hispanic candidate of choice, with 56% support from Blacks for the Hispanic candidate of choice; and 1990 Primary State Representative District 21, with 90% of whites voting against the Hispanic candidate of choice, in conjunction with 50% of vote from Blacks for Hispanic candidate.

[7] 1983 Primary Alderman Ward 25, Hispanic population was at 66 percent Hispanic

1984 Primary Ward Committee 25, Hispanic population was 67 percent Hispanic

in the district likely had more influence on the election than white voters.[8] In another four (4) elections, the data was not complete enough to permit the conclusion that whites voted sufficiently as a bloc to defeat the Hispanic candidate of choice.[9] In another election, the lack of cohesion of the Hispanic vote contributed to the loss of the Hispanic candidate of choice.[10]

Once the relevant electoral races have been discovered, a court must evaluate if bloc voting "usually defeats the minorities' preferred

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1984 Primary Ward Committee 31, Hispanic population was 54 percent Hispanic

1994 Primary Judge 6th Circuit, Hispanic population was 51 percent Hispanic.

[8] 1990 Primary State Representative District 35, a white candidate won with 58% of the white vote and 98% of the black vote; white voters thus supported the Hispanic candidate of choice with 42% of the vote. Likewise, in 1986 Primary U.S. Congressional District 2, a black candidate won with 100% of the black vote; 80% of white voters voted for the Hispanic candidate of choice.

[9] 1988 Primary Ward Committee District 10: in this race, although 98% of white voters voted for the winning white candidate, 86% percent of Blacks supported the winning white candidate, in addition to 90% of non-Hispanics, and without detail as to the ethnic make-up of the district, there is not enough evidence to say that whites voted sufficiently to defeat the Hispanic candidate of choice. Dr. Lichtman's report states that this district 10 is 22% Hispanic, 27% Black, but does not say what percentage is White. One can only presume "other" which would include Asians, and other ethnicities.

1991 Primary Aldermanic Ward 10: in this race, although 89% of whites voted for the white candidate over the Hispanic candidate of choice, 99% of blacks supported the white candidate. Like District 10 above, the percentage of white voters in the district is unknown, while Dr. Lichtman states in his report that it is 24% Hispanic, 28% Black, leaving another 48% "other" without definition.

1983 Primary Aldermanic Ward 7 Runoff: in this race Dr. Lichtman states in his report that white voting behavior is not available (i.e. "N/A"), therefore, in a district which 61% Black, 29% Hispanic, and thus only 10% "other", it is unconclusive to say that whites, even if they were up to 10% of the percentage of the district, that they voted sufficiently to defeat the Hispanic candidate of choice. The only candidates in this race were an Hispanic and Black.

1987 Primary Aldermanic Ward 7: in this race Dr. Lichtman states in his report that white voting is not available (i.e. "N/A"). In addition, in a district which was 65% Black and 25% Hispanic, and thus only 10% "other", it is unconclusive to say that Whites, could have voted sufficiently to defeat the Hispanic candidate of choice. The only candidates in this race were Hispanic and Black.

[10] 1983 Primary Aldermanic Ward 33: in this race, 55 percent of Hispanics selected the Hispanic candidate, leaving 45 percent selecting the white candidate. Further, the data is incomplete with respect to white voting behavior, as Dr. Lichtman's report states "N/A" as to the percentage of Anglo voters for Hispanic candidate.

candidate." *Gingles*, at 51, 106 S.Ct., at 2766. The Seventh Circuit recently interpreted this to mean "*consistently* defeat minority candidates". *NAACP v. Thompson*, No. 96-3315, slip op. at 5, (7th Cir. July 3, 1997), (emphasis added), *citing*, *Gingles* at 100, 106 S.Ct. at, 2792 (O'Connor, J. concurring) (the third prong of *Gingles* will be met where "bloc voting by white voters will consistently defeat minority candidates.") and, further, held that winning "a few [elections] is enough to negate the third element of the threshold showing under *Gingles*." *Id.* (citing *Abrams v. Johnson*, U.S.L.W. at 4491-93.). In *NAACP*, the court found that in contested elections between blacks and whites that the election of a black candidate in 7 of 16 elections was not a showing by the plaintiffs that whites "consistently" bloc voted against the minority. *Id.* at 7. Where an analysis of the races presented by Dr. Lichtman, and relied upon by the lower court, established that there were only three (3) legally significant instances of racially polarized voting under *Gingles*, out of a total of forty-one (41) elections analyzed and, further, where Hispanics' candidates of choice have won more than a "few" elections, there was no "consistent" loss. As the data show, Hispanic candidates of choice won in 27 out of the 41 elections. Therefore, based upon this review of the evidence, there was no "strong basis in evidence" for the lower court to find that the Defendants met their burden under the third prong of *Gingles* to justify upholding District 4.

C. Presence of the *Zimmer* Factors.

Even if this Court were to find that it was not error for the lower court to determine that there was a "strong basis in evidence" to find the presence of the *Gingles* threshold conditions, this would still be insufficient to uphold District 4 under §2. There also must be a finding of the presence of the *Zimmer* factors, probative of the ultimate finding under the "totality of the circumstances," that there is a "strong basis in evidence" for a §2 violation. A minority group must show in light of the *Zimmer* factors that the minority group has "had less opportunity than other members of the electorate to participate in the political process". *DeGrandy*, at __, 114 S.Ct., at 2657 (citing *Gingles* at 46, 79-80, 106 S.Ct., at 2674, 2781-2782; *id.*, at 98-99, 106 S.Ct., at 2791-2792 (O'Connor, J. concurring in judgment). This is a separate and distinct showing from showing that the minority group has had a "lack of electoral success". *See,*

DeGrandy, supra. The *Zimmer* factors are "neither comprehensive nor exclusive", *Gingles* at 45, 106 S.Ct., at 2763, and are "probative" of a violation, *id.* at 36, 106 S.Ct., at 2759, or in the case of a court approved plan, probative of whether a "violation of §2 would occur in consequence of a court's plan". *Abrams v. Johnson*, ___ U.S. ___, 117 S.Ct. 1935. The Defendant-Intervenors had the opportunity to present evidence under *Zimmer* not only from the *Hastert* litigation, but supplement that evidence.[11]

The lower court found that "prior judicial determinations . . . of electoral discrimination against the Hispanic community" in *Ketchum v. Byrne*, 740 F.2d 1398, (7th Cir. 1984) and *Rybicki v. State Board of Elections*, 574 F.Supp. 1082 (N.D.Ill. 1982), were sufficient for the *Hastert* court to have had a "strong basis in evidence" to conclude a §2 remedy was required. Opinion 1, App. 54. It is important to note that with respect to a trial in December 1995, the lower court relied upon prior judicial determinations for findings of fact, already previously made by the *Hastert* court, that arose in 1982 (*Rybicki*) and 1984 (*Ketchum*), which were eleven (11) and thirteen (13) years old respectively.[12] The record in this case discloses that the process of registering to vote, the process of getting to the polls, or the process of registering as a candidate was never challenged by the Defendants or Defendant-Intervenors. *See, also, DeGrandy*, at __, S.Ct., at 2660 (evidence which may establish a violation include "such reprehensible practices as ballot box stuffing, outright violence,

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[11] The lower court asserts that the Plaintiff did not contest the findings of the *Hastert* court under the "totality of the circumstances". The Plaintiff maintained that proof of this was proper at the trial in this case. Additional Trial Brief of Plaintiff, App. 102, ("In respect to the other findings of the *Hastert* court, for example, on past discrimination against Hispanics, the applicability of *stare decisis* does not preclude the Plaintiff from having his day in court, wherein the Defendants must make their showing.") Further, the Plaintiff never stipulated to any fact relevant to *Zimmer*. A letter sent to counsel for both MALDEF and the Department of Justice indicated that the Plaintiff would not be stipulating to facts relating to the "totality of the circumstances."

[12] Indeed, if the lower court were to find that "prior judicial determinations" were binding, it should have also taken into account a voting rights case concerning judicial districts, *Williams v. State Board of Elections*, 718 F.Supp. 1324 (N.D.Ill. 1989) a case which, unlike *Ketchum* and *Rybicki* was only two years prior to *Hastert*, and in which Hispanic plaintiffs in that case were found by that court to have produced "no evidence to support the allegation that white bloc voting usually results in the defeat of judicial candidates they prefer." *Williams* at 1329.

discretionary registration, property requirements, the poll tax, and the white primary. . . ."). Nor was it asserted that any prior congressional districting plan unlawfully diluted the votes of Hispanics. The record does not establish that the method and practices of electing members of congress from Illinois was other than non-discriminatory. The lower court was unable to cite to any evidence, and the record simply does not establish outside of the "prior judicial determinations", that Hispanics, at the time of this litigation in December 1995, nor any prior time relevant to the litigation in December 1995, had "less opportunity to participate in elections" under the "totality of the circumstances" and, therefore, the lower court did not have a "strong basis in evidence" to find that there was a violation of §2 in respect to Hispanics.

III. There Was No Compelling State Interest to Either Create or Uphold District 4 by Reason of Any Perceived Need to Maintain Surrounding African-American §2 Districts Under the Principle of Non-Retrogression.

The lower court maintains its assertion upon reconsideration that District 4 is narrowly-tailored because District 4's "extraordinary configuration was required to preserve shared communities of interest and protect the three African-American super-majority districts against impermissible retrogression". See, Opinion 1, App. 57, Opinion 2, App. 66-67. There is no compelling interest to avoid retrogression in a jurisdiction not covered by §5. Further, there was no evidence that District 4 was "narrowly-tailored" to the considerations of non-retrogression, and there was little evidence at trial indicating that inclusion of some Blacks in an Hispanic district or some Hispanics in a Black district would prevent the election of candidates of choice of either.

This Court has asserted the priority of traditional districting principles over nonretrogression:

> [w]e do not read *Beer* or any of our other §5 cases to give covered jurisdictions *carte blanche* to engage in racial gerrymandering in the name of nonretrogression.

Shaw v. Reno, 509 U.S. 630, 655, 113 S.Ct. 2816, 2831 (1993). Moreover, a choice must be made between two mutually exclusive remedies so as not to violate the Equal Protection Clause. *See, Bush*, at ___, 116 S.Ct., at 1972 (Kennedy, J., concurring) ("Section 2 does not require the State to create two noncompact majority-minority

districts just because a compact district could be drawn for either minority independently"), *see, also, DeGrandy v. Wetherell*, 815 F.Supp. 1550, 1582-83 (N.D. Fla. 1992) (Vinson, J. concurring). Thus, where a "reasonably compact" district could have been drawn for the Hispanics by the *Hastert* court ***but for*** the concerns of maintaining §2 African-American districts,[13] §2 did not require drawing District 4 for Hispanics. Moreover, neither the lower court, nor the *Hastert* court, considered influence districts as a remedy under these circumstances. *See, e.g., Rural West Tennessee African-American Affairs Council, Inc. v. McWherter*, 877 F.Supp. 1096, 1101 (W.D. Tenn. 1995) *aff'd. sum nom, Rural West Tennessee African-American Affairs Council, Inc. v. Sundquist*, ___ U.S.___, 116 S.Ct. 42 (1995).

IV. The Lower Court Had No Basis to Bind the Plaintiff to the Decision of *Hastert* by Modifying Rule 60(b) or Otherwise.

A. Plaintiff's Case Was Not a "Challenge" to the *Hastert* Decision.

In reviewing the evidence, the lower court imposed the standard of review of "clear error" as if the Plaintiff were seeking to modify an order under Federal Rule 60(b):

> [This] court therefore adopted the standards that *would have applied had King sought to modify the Hastert order under Rule 60(b)*.... To demonstrate that the *Hastert* court erred in making a specific finding of fact, *King has to establish that the court committed clear error. See Fed. R. Civ. P. 52(a)*

Opinion 1, App. 14 (footnotes omitted) (emphasis added). The lower court added that as part of its "clear error" burden the Plaintiff may also show that there was "a controlling or significant change in factual circumstances." Opinion 1, App. 14. And, further, despite language

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[13] It is not conceded by the Appellant that any of the African-American district were justified under §2. The Appellant, however, did not have standing to challenge those districts. There has been no showing that reduction of a district from 65% to some lower level in a multiethnic district would prevent candidates of choice of black voters from winning.

to the contrary,[14] where the lower court did not review any of the Plaintiff's evidence other than to establish "clear error" in *Hastert*,[15] this indicates that the lower court considered the Plaintiff's claim exclusively a challenge to the *Hastert* decision. *See,* Opinion 1, App. 14 ("King's lawsuit is at its very core a challenge to the *Hastert* court's order") *and* Opinion 1, App. 12 (The Plaintiff's "complaint both directly and indirectly challenged the *Hastert* court's findings of fact and judgment.")

In viewing King's claim as a "challenge" to the *Hastert* decision, the court characterizes King's claim against District 4 as follows:

> King proffers three "powerful reasons" warranting reexamination of the *Hastert* court's findings of fact and conclusions of law: first, the governing law has changed as a result of the Supreme Court's decisions in *Shaw* and *Miller*; second, certain factual findings made by the *Hastert* court were clearly erroneous; and third, the facts have changed since November 1991.

Opinion 1, App. 17. On the contrary, the Plaintiff's position was that, as a non-party to the *Hastert* proceeding, he was entitled to a *de novo* review of the evidence as in any civil action.

The evidence in *Hastert* was relevant to this case not only because the *Hastert* court approved District 4 but also because it found that the presence of the threshold conditions of *Gingles* and of the *Zimmer*

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[14] "[T]he *Hastert* court's conclusion that the district's extraordinary configuration was necessary to 'satisfy constitutional principles' is rendered circumspect by the change in governing law and is therefore subject to *de novo* review." Opinion 1, App. 25; "Since the *Hastert* court did not analyze whether the oddly drawn Fourth Congressional District met the requirements of the Equal Protection Clause, a presumption of constitutionality does not arise and no deference is accorded to the *Hastert* court on this issue." Opinion 1, App. 27.

[15] The lower court's findings in the case under strict scrutiny were as follows: "the *Hastert* court properly found that the City of Chicago/Cook County community was sufficiently numerous to constitute a majority in a properly drawn district." Opinion 1, App. 50. "King has thus failed to establish that the *Hastert* court's finding of political cohesiveness was clearly erroneous." Opinion 1, App. 50-51. "The *Hastert* court thus properly found that the third *Gingles* factor was satisfied in 1991, and King has not established any present day change in circumstances that would warrant a contrary finding." Opinion 1, App. 52. "The *Hastert* court properly held an Hispanic majority district was warranted under Section 2 of the Voting Rights Act." Opinion 1, App. 53. "[T]his court defers to the *Hastert* court's balancing of these concerns and concludes that it adopted a narrowly tailored plan." Opinion 1, App. 56.

factors established a violation of §2. The Plaintiff, however, as a non-party to *Hastert*, should never have been bound to the weight that the *Hastert* court assigned to that evidence. The weight and sufficiency of the evidence in *Hastert* should have been tested afresh by the King court in the King case; it should have been subject to the crucible of litigation between parties in fact adverse. This is critical because not only was King not a party to the *Hastert* litigation, but also because the creation and configuration of District 4 was never contested nor actually litigated in *Hastert*. The Plaintiff, as well as the Defendants, delved into the record of *Hastert* and had various witnesses testify in the King trial who participated in *Hastert* either as a witness and/or submitted an affidavit in support of creating District 4; in addition, the parties in the King case stipulated to different portions of the evidence in *Hastert*. Therefore, the weight and sufficiency of the evidence admitted in *Hastert*, in addition to the other evidence admitted by the parties in the instant case, was to be judged independently by the lower court without reference to the weight that the *Hastert* court assigned to its evidence.

Moreover, the evidence submitted clearly shows that the Plaintiff did not merely contest the findings of *Hastert* and that the Defendants did not consider their defense limited to buttressing the findings of *Hastert*, since both the Plaintiff and Defendants submitted evidence which was relevant to the time period subsequent to the *Hastert* decision. The Defendants submitted evidence from Dr. Lichtman's report of 16 elections covering the period from 1992 until 1995, Opinion 1, App. 52, while the Plaintiff supplemented those elections with an additional 11 elections concerning cross-over and white racial bloc voting covering the period 1992 to 1995. The Defendant-Intervenors also submitted evidence from witness Dr. Taylor who testified to socio-economic factors as of May 1992, after the creation of District 4. Further the Plaintiff submitted into evidence an additional 37 elections which he offered to show lack of political cohesion between Mexican-Americans and Puerto Ricans during the period of 1992 until 1995. The Plaintiff submitted evidence regarding the citizenship of Hispanics, data which was available only after the *Hastert* decision by special tabulation. Cleveland Report, App. 91. The Defendants submitted evidence that examined the grant of citizenship to Chicago area Hispanics until 1994. Taylor Report, App. 97, 98.

The Plaintiff could not have been considered to have "challenged" the decision of *Hastert* for a number of other reasons. First, the *Hastert* case obviously did not judge the facts of that case in light of the prevailing law at the time that King filed suit. The *Hastert* court did not consider whether or not District 4 was predominantly drawn on the basis of race. Consequently, it did not consider that District 4 ought to have been subject to strict scrutiny. Therefore, where the standards which were applied in *Hastert* were not the same as were required to be applied to the claim of the Plaintiff in the instant case, there was no basis to say that the Plaintiff "challenged" the *Hastert* decision.

Further, the Plaintiff could not "challenge" the *Hastert* decision if he was not a party to the *Hastert* case. Certainly, giving a case a future binding effect is necessary to preserve the finality of judgments. Under Rule 60(b) federal courts accomplish this through the imposition of the standard of "clear error" under Rule 60(b) and its concomitant standard "abuse of discretion". Rule 60(b), however, presumes that the person filing suit is attacking the judgment as a party to the prior proceeding. *See,* Rule 60(b). Neither King, nor a party in privity with King, was ever a party to the proceeding of *Hastert* and, therefore, the lower court had no basis to apply the standard of review applicable under Rule 60(b). In *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, *reh.den.* 110 S.Ct. 11 (1989) this Court said that:

> All agree that "[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." . . . This rule is part of our "deep-rooted historic tradition that everyone should have his own day in court." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4449 p.417 (1981).

Id. at 761, S.Ct. at 2184 (emphasis added). Thus, where a party such as King files an independent action, he has all the rights of a party in an independent action, including the right to prove his case by no more than a preponderance of the evidence. *See, Jackson v. DeSoto Parish School Bd.*, 585 F.2d 726, 729 (5th Cir. 1978) ("This

court has thus been unwilling to bar subsequent challenges to reapportionment schemes, seemingly constitutional when instituted by the court, but apparently inadequate under the rapidly changing jurisprudence of this area.")

Moreover, equitable application of collateral estoppel would show that the imposition of "clear error" was improper. The creation of District 4 was agreed to by all the parties to the proceedings in *Hastert* and as such it was never "actually litigated". Opinion 1, App. 18-19. *See, Prymer v. Ogden*, 29 F.3d 1208, 1212 (7th Cir. 1994) (in order to apply some equivalent of collateral estoppel, the factual issue must be "actually litigated"). And, therefore, "[a] fact established in prior litigation not by judicial resolution, but by stipulation has not been `actually litigated' and thus is the proper subject of proof in subsequent proceedings." *United States v. Young*, 804 F.2d 116, 118 (8th Cir. 1986), *Otherson v. Department of Justice, I.N.S.*, 711 F.2d 267, 274 (D.C. Cir. 1983); *see, also, United States v. International Bldg. Co.*, 345 U.S. 502, 504-505, 73 S.Ct. 807, 808-809 (1953). *See, Hastert* at 662.

B. "Judicial Economy" Was No Basis to Bind Plaintiff to the Findings in *Hastert*.

The lower court also justifies imposing a modified standard of Rule 60(b) on the basis of "judicial economy". Opinion 1, App. 15, n.16. Judicial economy, as a basis for binding a party to a prior judgment in a case to which he was not a party, was rejected by this Court in *Martin v. Wilks*, saying that acceptance of this argument

> would require a rewriting rather than an interpretation of the relevant Rules. . . . [W]e are not persuaded that [its] acceptance would lead to a more satisfactory method of handling cases like these. It must be remembered that the alternatives are a duty to intervene based on knowledge, on the one hand, and some form of joinder, as the Rules presently provide, on the other.

Id. at 767, S.Ct. at 2187. *See, also, Restatement of the Law (Second), Judgments*, §27 comment e ("the interests of conserving judicial resources . . . [is] less compelling when the issue on which preclusion is sought has not actually been litigated before.")

C. Upon Application of Strict Scrutiny, Deference to *Hastert* Erroneously Displaced the Usual Presumption that District 4 was Unconstitutional.

When the lower court gave deference to *Hastert* and raised the bar for the Plaintiff by requiring that he meet a standard greater than a preponderance of the evidence, the lower court dispensed with the presumption that District 4 was unconstitutional and its consequential burden upon the Defendants to demonstrate that there was a strong basis in evidence for finding a violation of §2 and that District 4 was narrowly-tailored. *Miller*, at __, 115 S.Ct., at 2490, *Shaw I* at ___, 113 S.Ct., at 2839-32. Even though the lower court acknowledged that "once strict scrutiny is required, the burden shifts to the State defendants to prove that the racially drawn district is justified.", Opinion 1, App. 30, citing *Miller* and *Shaw I, supra*, review of the lower court's analysis, in both its original and reconsidered opinions indicates that the lower court sought evidence from the Plaintiff to prove that there was no "strong basis in evidence" to find a violation of §2[16] and that District 4 was ***not*** narrowly-tailored;[17] in other words, to prove negatives.

In the lower court's original opinion, at "IV. A.", titled "Whether the *Hastert* court's Section 2 Finding Was Clear Error", App. 47-53, the lower court weighed the Defendants' evidence in finding that there was a "strong basis in evidence" for finding a violation of §2.[18] This evidence, however, was not considered outside the context

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[16] The lower court's language is explicit: "*King* has not established via competent evidence that the Hispanic citizen voting age population falls below fifty percent." Opinion 1, App. 50 (emphasis added). "*King* has thus failed to establish that the *Hastert* court's finding of political cohesiveness was clearly erroneous. He has likewise failed to establish that the circumstances have changed in any quantifiably significant measure since 1991." Opinion 1, App. 50-51 (emphasis added). The "proposition advanced by *King* [that white bloc voting has lessened since 1991] is [not] supported by recent city-wide election results or meaningful statistical analysis." Opinion 1, App. 51 (emphasis added)

[17] "There is no evidence that the *Hastert* court abused its discretion. . . . Under these circumstances, this court defers to the *Hastert* court's balancing of these concerns and concludes that it adopted a narrowly tailored plan." Opinion 1, App. 56. (citations omitted).

[18] The lower court cited the following in support: judicial notice of the elections of Congressman Gutierrez in 1992 and 1994 "minimize[s] in many respects the force of King's arguments that the *Hastert* court erred in finding that the three *Gingles* prerequisites were satisfied." Opinion 1, App. 47. Dr. Lichtman's analysis on the presence of white racial bloc voting defeats proposition by Plaintiff that

of *Hastert* to establish the Defendants' burden under strict scrutiny; in other words, the lower court considered the Defendants' evidence only in the context of whether the *Hastert* court was in error. As the lower court concluded, "[t]he *Hastert* court properly held an Hispanic majority district was warranted under Section 2 of the Voting Rights Act." Opinion 1, App. 53. Moreover, the analysis by the lower court does not include a discussion of the Defendants' burden or how the evidence submitted by the Defendants shows that they had met that burden. Similarly, in the lower court's narrow-tailoring analysis in its original opinion, the court simply deferred to the *Hastert* decision, without reference to the Defendant-Intervenors' burden or any evidence submitted by the Defendant-Intervenors. Opinion 1, App. 56-57. In the lower court's reconsidered opinion, the lower court refers to the burden being met, not in any way by the Defendants, but by the *Hastert* court.

V. Where District 4 Was Court-Approved, It Should Have Been Subject to a Standard of Strict-Scrutiny Greater Than That Applied to a Legislatively Enacted District.

In the instant case, District 4 was approved by a federal court panel in the *Hastert* case and upheld twice by the lower court in the instant case. Therefore, this is not a legislatively enacted gerrymander, but a judicially enacted gerrymander. A state legislature may engage in §2 remedial districting so long as it does not "subordinate traditional districting principles to race substantially more than reasonably necessary". *Bush*, at ___. Federal courts, on the other hand, lack constitutionally delegated authority to engage in redistricting absent a violation of federal law, *Voinivich*, at 156, S.Ct. at 1156-57, abdication by a state legislature of its responsibility to redistrict, *Wise*, at 540, S.Ct. at 2497, or absent a §2 claim under the Voting Rights Act or other equitable principles which require the creation of a §2 remedial district. *Abrams*, at ___, 117 S.Ct., at 1935. Thus, "[a] more stringent standard is applied to judicial reapportionments,

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there is less white racial bloc voting. Opinion 1, App. 51-52. Dr. Taylor's analysis, based upon amnesty data, that a large number of persons within the zip code areas where Hispanics reside defeated Plaintiff's proposition that voting population among Hispanics was below 50%. Opinion 1, App. 50-51 n. 58. Witnesses for the Defendant-Intervenors "establish[es] the political and social cohesiveness of the Hispanic community." Opinion 1, App. 51 n.59. "Exclusion of Hispanics from the powerfully important slating process remain." Opinion 1, App. 52. .

. . . , because a federal court, 'lacking the political authoritativeness that the legislature can bring to the task', must act 'circumspectly, and in a manner "free from any taint of arbitrariness or discrimination"'". *Wise v. Lipscomb*,. at 437 U.S. 535, 541, 98 S.Ct. 2493, 2498 (1978) (citing *Connor v. Finch*, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834, *Roman v. Sincock*, 377 U.S. 695, 710, 84 S.Ct. 1449, 1458 (1964)). *See, also, Bush*, at ___, 116 S.Ct., at 1961 ("[u]nder our cases, the States retain a flexibility that federal courts enforcing §2 lack . . . .").

The lower court applied a more lenient standard against District 4 when it "modified" application of Rule 60(b) to the Plaintiff and imposed a "clear error" standard. Had the lower court held District 4 to a standard of scrutiny required of a court-ordered plan, it would not have found District 4 narrowly-tailored. The excessive use of race in District 4 is clearly evident in the "ragged" boundary surrounding the district which segregates Hispanic from white and African-American populations, in addition to the "western connector" which selects Hispanic city blocks as it winds in and out of the City of Chicago to tie together two separate and dispersed Hispanic populations on opposite sides of town. *See,* Hispanic VAP Map, Attachment. Thus, if court-ordered plans are a standard in legislatively drawn §2 districts, surely District 4 is not a "hypothetical court-drawn district" from which legislatures may gauge their plans. *See, Bush*, at ___, S.Ct., at 1970, (O'Connor, J., concurring) ("districts that are bizarrely shaped and non-compact, and that otherwise neglect traditional districting principles and deviate substantially from the hypothetical court-drawn district, for *predominantly racial reasons*, are unconstitutional.") (emphasis in original).

CONCLUSION

This Court has recognized that racial gerrymandering is more than merely a matter of creating non-compact districts and subordinating other traditional districting criteria on the basis of race. The subordination of traditional districting criteria to race is indicative of a greater harm, that of

> reinforc[ing] the perception that members of the same racial group - regardless of their age, education, economic status, or the community in which they live - think alike, share the same political interests, and will prefer the same

candidates at the polls.

Shaw I, at __, 113 S.Ct., at 2827 (1993). And this perception, indeed, "may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract." *Id.*

If the lower court is not reversed, District 4 will continue to instill the perception that there is no longer the necessary dedication to protect equality under the law, *for all persons* regardless of their color, and will lend greater authority to group rights and the pernicious divisions that will continue to result therefrom. As a matter of law, District 4 is not narrowly-tailored. Where "appearances do matter" *Shaw I* at __, 113 S.Ct., at 2827, the lower court could not have upheld such a patently offensive racial gerrymander, even if there was a "strong basis in evidence" to find a violation of §2.

The Court should note probable jurisdiction. Summary reversal is appropriate for the reasons stated herein. Otherwise, the appeal should be set down for plenary review.

Respectfully submitted,

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